272(g) to the equal access restrictions imposed by section 251(g), Bell Atlantic and its affiliates have withheld the evidence needed by this Commission before it can find that they will comply. These equal access principles and the neutrality they provide when customers must deal with the incumbent LEC (as will overwhelmingly remain the case) for new or changed service are essential to ensure a fair opportunity for other carriers to compete.[29]

A. Bell Atlantic's National Directory Assistance Service Violates Section 272.

Bell Atlantic currently advertises and provides national directory assistance (NDA) service to customers located within its service areas. This service, which allows customers to dial "411" to obtain telephone numbers for subscribers located anywhere in the United States, plainly violates Section 272, and appears to violate section 271.[30]

In the NDA Order, the Commission held that U S WEST's NDA service "constitutes the provision of in-region, interLATA service" barred by section 271. NDA Order ¶¶ 20, 24. The Commission noted that if the NDA service used only BOC-owned databases -- which was not the case with U S WEST -- it would constitute an "incidental interLATA service" under section 271(g)(4), and then could be offered before section 271(d) authorization. Id. ¶ 24. The Commission made clear, however, that section 272(a) required that this NDA service, whether an

[29] The Commission has also recognized the importance of retaining complete neutrality in the PIC selection process and that, given changes in the marketplace, incumbent LECs may no longer be the appropriate parties to administer that important process. See Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers, Further Notice of Proposed Rulemaking, CC Docket No. 94-129, released December 23, 1998. AT&T's Comments, filed March 18, 1999, pp. 15-29 & Appendix, and its Reply, filed May 3, 1999, pp. 3-18, in that proceeding, as well as the comments of numerous other carriers, demonstrated that, for precisely these reasons, it is necessary to remove incumbent LECs as the administrators of the PIC process and to substitute a neutral third party.

[30] See Kargoll Aff., ¶¶ 15-20.

incidental interLATA service or not, be offered only through an affiliate that satisfied section 272. Id.[31]

Although the NDA Order was released before Bell Atlantic filed its section 271 application, Bell Atlantic presents no evidence on its NDA service, and makes no attempt to justify its current and ongoing provision of this service. Because Bell Atlantic is not providing NDA through a separate section 272 affiliate,[32] it plainly violates section 272(a). Moreover, Bell Atlantic has provided no reason to doubt that it, like U S WEST, provides NDA by using databases that it does not own. In that event, its NDA service violates section 271 as well.

In addition, the NDA Order confirmed that a BOC providing NDA services is subject to the nondiscrimination requirements of section 272(c)(1) , and hence must make available to unaffiliated entities the same directory listing information it uses to provide NDA "at the same rates, terms, and conditions it imputes to itself." NDA Order ¶ 37. Bell Atlantic presents no evidence to allow the Commission to find that Bell Atlantic now provides, or in the future will provide, unaffiliated entities with full access to the directory data that it now uses to provide NDA, under the same rates, terms and conditions that it enjoys.[33]

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[31] NDA Order ¶ 28. The NDA Order granted U S WEST's petition for forbearance under section 10 of the Act from application of section 272(a)'s separate affiliate requirement for U S WEST's NDA service. The Commission, however, "emphasize[d] that [its] decision to forbear in the instant proceeding is limited exclusively to U S WEST's provision of regionwide directory assistance service." NDA Order ¶ 54. Moreover, the Commission did not forbear from applying the nondiscrimination requirements imposed by section 272(c) to the extent U S WEST's service otherwise complied with section 271(a). NDA Order ¶ 56. Bell Atlantic has not even asked in this proceeding for the limited forbearance comparable to U S WEST's, let alone sought to justify it.

[32] See Kargoll Aff., ¶ 18.

[33] Significantly, in granting U S WEST forbearance from the separation requirements of section 272(a), the Commission held that section 272(c)'s nondiscrimination requirements continued to apply in full force. NDA Order ¶¶ 35-41.

In sum, Bell Atlantic's NDA clearly violates section 272 and appears to violate section 271(a). Bell Atlantic does not even acknowledge these violations, let alone cure them. For this reason alone, its application is defective and must be denied.

B. Bell Atlantic And Its Section 272 Affiliates Do Not Meet The "Operate Independently" Requirement Of Section 272(b)(1).

Section 272(b)(1) requires that a BOC and its long distance affiliates "operate independently," meaning, among other things, that section 272 affiliates may not contract with a BOC "to obtain operating, installation, and maintenance functions associated with the section 272 affiliate's facilities."[34] Bell Atlantic and its section 272 affiliate, BAGNI, violate this requirement.

As part of its network construction efforts, BAGNI has leased real estate from Bell Atlantic for at least fourteen different sites that either are being used, or will be used, to locate and operate BAGNI switches and transmission equipment.[35] At a number of these locations, based on Internet disclosures, Bell Atlantic has contracted to provide BAGNI broad assistance in preparing the sites for the placement of BAGNI's switches and transmission equipment.[36] Such

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[34] Non-Accounting Safeguards Order ¶ 163; Non-Accounting Safeguards Third Order on Reconsideration ¶ 20.

[35] See Kargoll Aff., ¶ 23.

[36] Kargoll Aff., ¶¶ 24-26. For example, Bell Atlantic commits to provide BAGNI the following services at a BAGNI-leased site in New York City: "prior to the completion of construction of BAGNI's tenant improvements: project management services for the construction of tenant improvements and on-site supervision of construction activities by property management employees." After the "tenant improvements" are completed, Bell Atlantic commits to provide "repair and maintenance services, including all preventative maintenance routines." Kargoll Aff., ¶ 25 (citing Amendment No. 1 - Lease of 5030 Broadway, New York, NY). Similarly, at a BAGNI-leased site in Springfield, Massachusetts, Bell Atlantic commits to provide "on site coordination of construction services." and "demolition of existing voice and data wiring needed in connection with the construction of the Tenant Improvements." Kargoll Aff., ¶ 24 (citing Bell Atlantic Global Networks, Inc. Lease of Building Space at 365 State Street Springfield,

site preparation services are an integral part of the installation work needed for BAGNI's switches and transmission facilities. These services violate section 272(b)(1)'s bar against a BOC performing "installation, or maintenance functions associated with the facilities that the section 272 affiliate owns." Non-Accounting Safeguards Order ¶ 158. As the Commission has recognized, allowing BOCs to provide such services would "create substantial opportunities for improper cost allocation, in terms of both the personnel time spent in performing such functions and the equipment utilized." Id. ¶ 163.

C. Bell Atlantic Has Violated, And Continues To Violate, The Disclosure Requirements Of Section 272(b)(5).

Section 272(b)(5) requires that "all transactions" between Bell Atlantic and its section 272 affiliates be "reduced to writing and available for public inspection." A BOC thus must disclose all transactions with its section 272 affiliate occurring after passage of the Act, on February 8, 1996. Ameritech Michigan Order ¶ 371. In addition, the Second BellSouth Louisiana Order, ¶ 333, requires BOCs to "post the terms and conditions of the transaction . . . on the Internet within 10 days" with sufficient detail to evaluate its compliance with section 272 and the Commission's rulings. These public disclosure obligations are critical to enabling CLECs, IXCs, and the Commission to assess whether a BOC is engaging in transactions that discriminate in favor of its section 272 affiliate, or is otherwise violating the obligations imposed by section 272. Bell Atlantic and its section 272 affiliates fall well short of satisfying these public disclosure requirements.

First, Bell Atlantic fails to provide a "detailed written description" of each transaction with its section 272 affiliates on the Internet. To meet this obligation, the disclosure must

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Massachusetts). Other lease transactions disclose similar "project management" and construction oversight services. Kargoll Aff., ¶ 25 "include a description of the rates, terms, and conditions of all transactions, as well as the frequency of recurring transactions and the approximate date of completed transactions," and, for service transactions, "the length of time required to complete the transaction." Second BellSouth Louisiana Order ¶ 337.

The terms and conditions disclosed by Bell Atlantic for a variety of transactions do not meet these requirements. For example, nine separate "Technical Services Agreements" disclosed on the Internet provide as follows under the heading "terms and conditions:"

> Under this Agreement, the Bell Atlantic telephone company listed above will provide certain programming services for billing, inquiry, and other functions that will be provided to BACI.

Kargoll Aff. ¶ 34. This vague description of "certain" undefined "programming services" provided for billing, inquiry and unspecified "other functions" offers nowhere near the level of detail required by section 272(b)(5) and the Commission's rules.[37] These disclosures also fail to indicate whether Bell Atlantic has actually begun to provide such services, and fail to state "the approximate date of completed transactions," or the "length of time required to complete the transaction."[38] Other posted transactions similarly provide only a bare summary of the terms and conditions, and fail to disclose approximate dates of completed transactions or the length of time needed to complete the transaction. Kargoll Aff. ¶¶ 35.

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[37] Subsequent amendments to these nine agreements disclose Bell Atlantic's commitment to provide "additional programming services," and provide a somewhat more detailed description of these additional services. These amendments, however, do not provide information regarding the programming services already provided under the original technical services agreements. *See* Kargoll Aff., ¶ 34.

[38] Kargoll Aff. ¶ 34. Indeed, the only means of determining whether any actual services were provided at all is to look at subsequent amendments to other technical services agreements, in which Bell Atlantic commits to provide "operational readiness testing" of certain identified "systems and processes," and notes that "[p]rogramming for several of such systems was

In addition, for the majority of the disclosed transactions, Bell Atlantic reveals only the anticipated framework of the transaction, without any indication whether it was completed, and, equally important, whether the concluded transaction mirrored what had been anticipated. Thus, for example, a number of posted transactions include "estimated one time fee[s]" based on work performed, but not one has been updated to disclose what were the actual fees paid.[39] Similarly, disclosed lease transactions include provisions for yearly rent increases, but none has been updated to reflect the current rental rates. Kargoll Aff. ¶ 38.

Faced with such vague, minimal descriptions reflecting only anticipated transactions -- without updates disclosing whether the transaction has been completed, how long it took to complete, and whether the rate has changed -- unaffiliated entities have no basis from which to evaluate whether they too would want to acquire such services from Bell Atlantic, or whether the services they currently receive are under discriminatory terms and conditions. These disclosures are insufficiently detailed to satisfy section 272(b)(5).[40]

In addition, Bell Atlantic does not appear to have disclosed all affiliate transactions occurring after February 8, 1996. First, as noted above, a number of the transactions posted on the Internet by their own terms should have been updated to reflect new rental rates and revised labor costs, but no such updated transactions have been posted. Kargoll Aff. ¶¶ 42-43. Second, despite Bell Atlantic's stated intent to share its CPNI with its section 272 affiliates, it has

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previously developed under separate agreement." See Kargoll Aff., ¶ 34 & n.43 (citing Amendment No. 1 to Technical Services Agreement-NY).

[39] Kargoll Aff. ¶ 37. Although these disclosures list hourly rates and the number of employees anticipated for the transactions, there is no basis for unaffiliated entities to determine whether the one time fees are reasonable without some confirmation of the actual transactions, rather than predictions concerning those transactions.

[40] Bell Atlantic and its section 272 affiliates also have failed repeatedly to meet the ten-day Internet posting requirement. See Kargoll Aff., ¶¶ 49-51.

disclosed no transaction concerning CPNI. Kargoll Aff. ¶ 44. Third, although BACI and NLD existed before the Act's passage, and BAGNI was incorporated in February 1998, Bell Atlantic does not disclose a single transaction (other than those involving voice and data telecommunications services, and messaging services) with an effective date before June 1998. Kargoll Aff. ¶ 46. Bell Atlantic provides no explanation for the absence of any other exchanges with these affiliates of services, information, or assets during this initial 2 1/2 year period. Id.

On this record, Bell Atlantic "does not provide adequate assurances or demonstrate that it makes publicly available all transactions ... as required by section 272(b)(5) and the Commission's rules."[41]

D. Bell Atlantic Has Not Demonstrated Compliance With Its Nondiscrimination Obligations Under Section 272(c).

Section 272(c)(1) "requires that a BOC in its dealings with its section 272 affiliate 'may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards.'" Second BellSouth Louisiana Order ¶ 341 (quoting § 272(c)(1)). Bell Atlantic has not demonstrated compliance with this nondiscrimination requirement.

[41] Second BellSouth Louisiana Order ¶ 335. Indeed, when a BOC elects to provide in-region interLATA service through a pre-existing affiliate, as Bell Atlantic has done, it must be called on to present detailed evidence regarding what it did to identify all past transactions, and to correct any past impermissible transactions or subsidies. Otherwise, the Commission has no assurance that all such prior problems were identified and rectified and that Bell Atlantic's section 272 affiliates will not be able to enter the interLATA market and have access to the very anticompetitive advantages that section 272 was designed to prevent. Here, Bell Atlantic makes only a vague claim that an investigation was undertaken "to ascertain what transactions have occurred since the Act," and that "all such transactions have been conformed to the requirements of the Act and the Commission's rules." Browning Declaration, ¶ 12.c. Such general promises are insufficient. See Kargoll Aff., ¶¶ 58-59.

As discussed above, Bell Atlantic leases at least fourteen separate sites to BAGNI for the purpose of housing BAGNI switches and transmission equipment. Kargoll Aff. ¶ 54. These leases are substantial, with a total annual rental value (based on Bell Atlantic's Internet disclosures) of approximately $625,000, and plainly are of critical importance to BAGNI's stated plan to construct its own network. Kargoll Aff. ¶ 54. Yet Bell Atlantic has presented no evidence to show that these lease arrangements were entered into in a nondiscriminatory manner.

For example, Bell Atlantic's Internet site discloses that it leased to BAGNI over 11,000 square feet of space in mid-town Manhattan for an initial rental rate totaling $403,587 per year, which allows BAGNI to control the space for five years. Kargoll Aff. ¶ 56. Bell Atlantic presents no evidence, however, that this site -- or any other of its leased sites -- was made equally available to unaffiliated IXCs and CLECs. Kargoll Aff. ¶ 55-56. If Bell Atlantic failed to make these rental spaces (suitable for switching and transmission equipment) available to competing carriers, then its lease arrangements with BAGNI discriminated against unaffiliated entities in violation of Section 272(c)(1). See Non-Accounting Safeguards Order ¶¶ 160, 218. Such discrimination must be presumed in the absence of any countervailing evidence from Bell Atlantic.

Moreover, Bell Atlantic's intended sharing of its CPNI with its section 272 affiliates should also be found to violate section 272(c)(1). The Commission's CPNI Order -- by ruling that CPNI is not "information" under section 272(c)(1) -- authorizes discriminatory treatment in favor of the BOCs' section 272 affiliates. Under the CPNI Order, a section 272 affiliate can get a customer's BOC CPNI without first obtaining affirmative written customer approval, but an unaffiliated IXC must receive such affirmative written consent from its customer before obtaining BOC CPNI. Kargoll Aff. ¶¶ 83-86.[42]

E. Bell Atlantic Has Not Presented Evidence To Show That Its Planned Joint Marketing Will Comply With Sections 251(g) and 272.

A BOC's authority to market its section 272 affiliates' in region interLATA services is governed by section 251(g), which continues the pre-1996 Act equal access requirements, and section 272(g), which exempts BOC/affiliate "joint marketing" from the nondiscrimination safeguards of section 272(c). In its Internet disclosures, Bell Atlantic makes clear that thousands of its employees will be involved in joint marketing its section 272 affiliates' interLATA services with its own local exchange services. Kargoll Aff. ¶ 60. Yet Bell Atlantic provides no evidence as to the specific marketing efforts in which it intends to engage, the marketing scripts it will use, or whether or how it will be involved with the planning, design, or development of its affiliates' long distance products. Kargoll Aff. ¶¶ 60, 71. Bell Atlantic's general pledge to comply with section 272(g), without even mentioning its section 251(g) obligations, provides no basis on which to conclude that Bell Atlantic will comply with these requirements.[43]

Section 251(g) provides that the BOCs are subject to "the same equal access . . . restrictions and obligations" that applied before passage of the Act, until these requirements are

[42] Bell Atlantic's failure to provide nondiscriminatory access to its OSS also violates section 272(c)(1). See Crafton/Connolly Aff.

[43] The need for more than general promises of future compliance is especially important in the context of "joint marketing," because section 272(g)(3) is the sole exception to BOCs' otherwise unqualified nondiscrimination obligations under section 272(c) and (e), and BOCs have shown a willingness to adopt unreasonably expansive interpretations of "joint marketing" in an effort to shield their conduct from these nondiscrimination obligations. See, e.g., Non-Accounting Safeguards Third Order On Reconsideration ¶ 39 (rejecting BOC claim that planning, design, and development of affiliate's long distance products should fall within the joint marketing exception, noting that this reading "would create a loophole that would allow potential BOC discrimination in countless activities."); CPNI Order on Reconsideration ¶ 146.

"explicitly superseded by regulations." A core requirement of equal access is -- and has long been -- that when a BOC receives an incoming customer call for new service or a PIC change, the BOC representative must advise the customer of his or her options for long distance service in a neutral manner.[44] In the Non-Accounting Safeguards Order, the Commission confirmed that the pre-Act equal access requirements continued to restrict BOCs' handling of inbound calls for new service or PIC changes, holding that "[t]he obligation to continue to provide such nondiscriminatory treatment stems from section 251(g) of the Act, because we have not adopted any regulations to supersede these existing requirements." Non-Accounting Safeguards Order ¶ 292. The Commission reinforced these findings in the Ameritech Michigan Order ¶ 376, holding that a proposed Ameritech marketing script that "[m]ention[s] only Ameritech Long Distance unless the customer affirmatively requests the names of other interexchange carriers is inconsistent on its face with our [equal access] requirement that a BOC must provide the names of interexchange carriers in random order."

Four months later, in its BellSouth South Carolina Order, the Commission again acknowledged the continued application of the equal access requirements pursuant to section 251(g), but held, contrary to the Ameritech Michigan Order, that "BOCs may mention their section 272 affiliate, apart from including that affiliate in a list of available interexchange carriers," so long as they also contemporaneously "offe[r] to read, in random order, the names and, if requested, the telephone numbers of all available interexchange carriers." BellSouth South Carolina Order ¶ 239. This ruling was reaffirmed in the Second BellSouth Louisiana

[44] See, e.g., United States v. Western Electric Co., Inc., 578 F. Supp. 668, 677 (D.D.C. 1983) (holding that, during calls for new service, "no favoritism [may be] shown to any particular carrier").

Order ¶ 357, which concluded that "BOCs may mention their section 272 affiliate, apart from including that affiliate in a list of available interexchange carriers."

As this history makes abundantly clear, the Commission has long regarded joint marketing practices under section 272(g) as an important part of the showing a BOC must make to establish that it will comply with section 272. Bell Atlantic's compliance with its equal access obligations is vital to the future of fair and open local competition. As the monopoly provider of local phone service for decades, Bell Atlantic-New York is synonymous in the minds of most New York consumers with local phone service. By virtue of its venerable monopoly presence, Bell Atlantic has a pre-existing and often longstanding relationship with nearly every local phone customer in New York. When these customers need new local phone service (for example, following a move within the state), most will naturally think to contact Bell Atlantic. Bell Atlantic must not be permitted to capitalize on its monopoly-based receipt of these calls by steering each of these customers to its own long distance affiliate. Fair competition demands instead that Bell Atlantic demonstrate that its affiliate will compete with other long distance carriers on the merits, and not simply as the heir to Bell Atlantic's legacy of monopoly.

To even begin to meet this burden, Bell Atlantic must provide evidence showing how it intends to satisfy its equal access obligations on inbound calls for new service or PIC changes, including the marketing scripts it proposes to use during such calls. Bell Atlantic has submitted no such evidence. Indeed, Bell Atlantic does not even acknowledge its continuing equal access obligations, or recognize the significant restrictions these requirements impose on its joint marketing activities. Kargoll Aff. ¶ 71.

In addition, Bell Atlantic must present evidence regarding its past or planned involvement in planning, designing, or developing long distance products for its affiliates. Such activities are not "joint marketing" under section 272(g), and thus, like all other services, must be provided on a nondiscriminatory basis to affiliated and unaffiliated entities alike. Non-Accounting Safeguards Third Order on Reconsideration ¶ 39. Bell Atlantic again provides no evidence on this issue, vaguely stating only that "to the extent" it provides such services, it shall provide them on a nondiscriminatory basis. Kargoll Aff. ¶ 69.

The complete absence of evidence from Bell Atlantic concerning these critical issues under sections 251(g) and 272(g) provides the Commission no basis on which to find, as it must before granting Bell Atlantic in-region interLATA authority, that Bell Atlantic will comply with sections 251(g) and 272(g) should it be granted such authority. Bell Atlantic's application is thus fatally deficient on this ground.

Even if Bell Atlantic were to present (which it has not) evidence of marketing scripts consistent with BellSouth South Carolina Order, however, such marketing practices should be rejected as contrary to the equal access requirements continued by section 251(g). In AT&T's view, the Ameritech Michigan Order correctly held that any discriminatory identification of the BOC's section 272 affiliate during such inbound calls is "inconsistent on its face" with the equal access requirements expressly continued by section 251(g). Section 272(g)'s undefined "joint marketing" authority cannot reasonably be read to modify section 251(g), which is specific, detailed, and contains no exception for BOC "joint marketing" activities. It is equally plain that the equal access requirements did not -- and do not -- allow a BOC to recommend or "mention" any IXC in preference to another during the presubscription process.

Finally, no claim can be made that the pre-Act equal access bar of all discrimination among IXCs during the presubscription process has since been modified. The plain language of section 251(g) provides that the existing equal access requirements continue to apply "until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment." Although an agency ordinarily has discretion to proceed by rulemaking or adjudication,[45] section 251(g) expressly mandates that the Commission proceed by rulemaking should it consider amending the existing equal access requirements.[46] No such rulemaking has been undertaken.

For these reasons, the Commission should reassert the principles identified in the Non-Accounting Safeguards Order and the Ameritech Michigan Order -- and mandated by section 251(g) -- and hold that all discriminatory steering of customers to a particular IXC during inbound calls for new service or a PIC change violates equal access requirements and thus is not authorized under section 272(g).

In sum, Bell Atlantic and its section 272 affiliates have not met their burden of showing that they will operate in accordance with section 272 if granted in-region interLATA authority. This application may be rejected on that basis alone.

III. BELL ATLANTIC'S ENTRY INTO THE INTEREXCHANGE MARKET IS NOT CONSISTENT WITH THE PUBLIC INTEREST.

Finally, Bell Atlantic's application should be denied because Bell Atlantic has not met its burden to show that its interLATA authorization would be "consistent with the public interest, convenience, and necessity." § 271(d)(3)(C); see Ameritech Michigan Order ¶ 43 ("Section 271 places on the applicant the burden of proving that all of the requirements for authorization to provide in-region, interLATA services are satisfied."). Bell Atlantic's contrary contentions are meritless.

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[45] See, e.g., SEC v. Chenery, 332 U.S. 194, 202-03 (1947),

Although, with persistent prodding from the New York PSC, Bell Atlantic has taken important steps to open its local markets, the undisputed evidence described below shows that Bell Atlantic maintains overwhelming shares of New York's local markets. The limited progress Bell Atlantic has made toward opening up its markets in the last two year reflects not only the close oversight of the New York PSC during that period, but also Bell Atlantic's incentive under Section 271 to comply with the Act. If that incentive is now eliminated, Bell Atlantic's cooperation in the opening of New York markets will evaporate, harming consumers in local and long distance markets alike. Indeed, the risks of persistent discrimination and backsliding are so serious that one state in Bell Atlantic's service region, Pennsylvania, has insisted on tough structural remedies well beyond anything the New York PSC has required.[47] These risks require proof that business and residential consumers throughout the state have true competing alternatives before an RBOC's entry into long distance will be in the public interest. Bell Atlantic cannot provide such proof today.

A. The Absence Of Competition In New York Local Exchange Markets Demonstrates That Bell Atlantic's Entry Into The Interexchange Market Would Be Inconsistent With The Public Interest.

In the Ameritech Michigan Order, the Commission held that the public interest "inquiry should focus on the status of market-opening measures in the relevant local exchange market" (id. ¶ 385) and determine whether the "local telecommunications market is, and will remain, open to competition." Id. ¶ 386. Notwithstanding seventeen years of effort by the New York

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[46] See Perales v. Sullivan, 948 F.2d 1348, 1356 (2d Cir. 1991) (holding that statute directing that certain claims be "in such form and manner as the Secretary [of HHS] shall by regulations prescribe" required that agency to proceed by rulemaking, not adjudication).

[47] Joint Petition of Senators Fumo, Madigan and White, et al. for Adoption of Partial Settlement Resolving Telecommunications Issues, P-00991648 (Pennsylvania Public Utility Commission

PSC to open local markets in New York to competition,[48] Bell Atlantic retains overwhelming market shares and market power in the provision of exchange and exchange-access service and facilities. For this reason alone, Bell Atlantic's entry into the interLATA market in New York could not be in the public interest.

1. Bell Atlantic Retains Overwhelming Market Shares And Market Power In The Local Exchange Market.

Bell Atlantic's first public interest argument is that "local competition (particularly facilities-based local competition) is thriving." Br. at 61. Local competition in New York can only be characterized as "thriving" if it is compared to the utterly trivial level of local competition in other states. Under any meaningful standard, New York's local exchange markets remain completely dominated by Bell Atlantic. See generally Kelley Aff. ¶¶ 24-32 (describing limited CLEC facilities–based competition by reporting lines, switches and fiber deployed by CLECs and the number of buildings served).

Table 1 summarizes the key market penetration data for competitors providing services over their own facilities. Statewide, less than 5% of the local loops are provided by Bell Atlantic's competitors. Kelley Aff. ¶ 2. The share of facilities loops provided by competitors outside of the New York City/Long Island area is only 1.82%. Id. The share in the New York City/Long Island area is only 5.70%. The share of facilities loops provided by competitors to residential consumers statewide is only 1.88% and outside the New York City/Long Island area is a minuscule 0.42%.

Meeting August 26, 1999) (in view of Bell Atlantic monopoly control of Pennsylvania local exchange, structural separation of its wholesale and retail operations is necessary).

[48] See Br. 68-69 (recapping the New York PSC's efforts).

Table 1 (Source: Kelley Aff. ¶2)
CLEC Facilities-Based Market Penetration

	Bus.	Res.	Total
Upstate MSAs[49]	5.62%	.042%	1.82%
Downstate MSAs	10.14%	2.54%	5.70%
All MSAs	9.28%	1.88%	4.75%

As summarized in Table 2, the use by competitors of unbundled loops, platform and resale is also limited. Only 4.20% of the access lines in Bell Atlantic's New York service territories are being provided via resale or UNEs.

Table 2 (Source: Kelley Aff. ¶3)
CLEC Non-Facilities-Based Market Penetration

	UNE Bus.	UNE Res.	Resale Bus.	Resale Res.	Total
Upstate MSAs	.096%	0.82%	10.18%	0.43%	4.12%
Downstate MSAs	1.10%	2.37%	4.44%	0.99%	4.22%
All MSAs	1.07%	1.93%	5.58%	0.83%	4.20%

Another significant indicator of Bell Atlantic's market power is its ability to maintain prices for residential and business customers at the maximum allowable levels under the price caps on local exchange and access services. Bernheim/Ordover/Willig Aff. ¶¶ 35-36 & Att. 4. Historically, regulation constrained Bell Atlantic's ability to exercise its monopoly power in the provision of local exchange services, including access. Id. ¶ 35. Bell Atlantic's market power has been "latent" in the sense that, if Bell Atlantic were to be freed from the regulatory constraints, it would have elevated its prices to supra-competitive levels. Id. A firm with "latent" market power is compelled to seek its monopoly returns elsewhere. In particular, a regulated firm with latent market power will -- if allowed to do so -- seek to capture some of these unrealized returns in "adjacent," unregulated markets. Id. Despite the “thriving” competitive entry asserted

49 "Downstate" MSAs include the New York City and Nassau/Suffolk (i.e. Long Island) MSAs. "Upstate" MSAs include MSAs other than New York City and Nassau/Suffolk.

by Bell Atlantic, it maintains its prices for local services at the maximum allowable levels. Id. ¶ 36 & Att. 4. This evidence further supports the conclusion that entry has not yet been an effective constraint. Id.

Faced with a New York local exchange marketplace with minimal levels of facilities-based competition, Bell Atlantic argues that allowing it into long distance will create significant incentives for the major IXCs to enter into the local market. Br. 67. The defects in this argument are at least three-fold. First, as Bell Atlantic itself has recognized, the major IXCs have already invested billions of dollars to provide local service in New York. E.g., Taylor Dec. ¶¶ 46-50. Second, market penetration of facilities-based competitors remains paltry despite the efforts of numerous non-IXCs (whose incentives are presumably unaffected by Bell Atlantic entry into long distance) to enter local markets. Third, the Commission has already rejected the argument that a lack of local competition can reasonably be ascribed to CLECs' failures to devote adequate resources to the endeavor, BellSouth South Carolina Order ¶ 25, and the extraordinary level of CLEC investment in New York clearly forecloses any such argument here.

2. Bell Atlantic's Premature Entry Into The Interexchange Market Would Provide Bell Atlantic Incentive And Opportunity To Harm Competition.

Based on its view that facilities-based competition is "thriving," Bell Atlantic baldly asserts that it "simply lacks the ability to stifle competition; competitive networks will remain regardless of Bell Atlantic's conduct." Br. 68. Bell Atlantic's notion that a company enjoying market shares ranging from 85% to 99% in New York local markets is incapable of harming competition squarely conflicts with common sense as well as case law.[50]

[50] Courts have almost invariably found that market shares in the 70% to 90% range are more than sufficient to confer market power and to pose a threat of anticompetitive behavior. See, e.g., Eastman Kodak Co. v. Image Technical Services, 504 U.S. 451, 481 (1992) (80 % market share sufficient for finder of fact to infer monopoly power); United States v. Grinnell Corp., 384 U.S.

Currently, Bell Atlantic's only economic incentive to open its local markets is the prospect of long-distance entry. Hubbard/Lehr Aff. ¶¶ 101-02, 124-27; Bernheim/Ordover /Willig Aff. ¶¶ 67-75. Once Bell Atlantic is granted interLATA authority, its sole incentive will be to further impede the development of local competition, both to protect monopoly revenues it enjoys from local exchange and exchange access services, and to maintain its anticompetitive advantages over other carriers that would otherwise seek to provide competing bundles of local and long distance services. Hubbard/Lehr Aff. ¶¶ 94-109; Bernheim/Ordover/Willig Aff. ¶¶ 38-80; see DOJ SC Eval., Schwartz Supp. Aff. ¶ 34. It would have every incentive to exploit its more efficient access to OSS, for example, to preclude other carriers from competing as to quality, and to raise its rivals' costs. See Aquilina Aff. ¶¶ 20-38; Mulligan Aff. ¶¶ 37-38.

Granting Bell Atlantic's application now would therefore quickly create a second monopoly in addition to Bell Atlantic's current monopoly over local exchange service -- a monopoly over the provision of <u>bundled</u> packages consisting of Bell Atlantic's local service and long distance service (which Bell Atlantic could either self-provision or buy at a wholesale discount far greater than the 19.1 percent discount available to would-be CLECs in New York). Bell Atlantic witnesses Taylor and MacAvoy argue that Bell Atlantic must be allowed to enter long distance to <u>compete</u> for the provision of bundled goods. Taylor Aff. ¶¶ 35-38; MacAvoy Aff. ¶ 10. As the record in this case demonstrates, however, there is little competition in the

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563, 571 (1966) (stating that monopoly power "ordinarily may be inferred from the predominant share of the market" where defendants had 87% market share); <u>United States v. E.I. du Pont de Nemours & Co.</u>, 351 U.S. 377, 379-380 (1956) (stating that over 75 % market share would constitute monopoly power); <u>Morgenstern v. Wilson</u>, 29 F.3d 1291, 1296 n.3 (8th Cir. 1994) (80% market share enough to infer power), <u>cert. denied</u>, 115 S. Ct. 1100 (1995); <u>Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.</u>, 917 F.2d 1413, 1443 (6th Cir. 1990) (58% share of relevant contracts over seven-year period held sufficient), <u>cert. denied</u>, 502 U.S. 808 (1991); <u>Weiss v. York Hosp.</u>, 745 F.2d 786, 827 (3d Cir. 1984) (over 80% sufficient), <u>cert. denied</u>, 470 U.S. 1060 (1985).

local market. Therefore, Bell Atlantic would be the only carrier with the opportunity to offer end-to-end service in significant volumes, and would be able to use its control over critical UNE inputs like OSS and UNE loops to foreclose competition for the numerous subscribers that would find that offering attractive. Hubbard/Lehr Aff. ¶¶ 15, 98-99, 129-31; Bernheim/ Ordover/Willig Aff. ¶¶ 62, 159.

Bell Atlantic could also harm long distance competition by means of price squeezes against its long distance competitors by continuing to impose charges for non-competitive exchange access inflated above Bell Atlantic's cost of providing such access.[51] Bell Atlantic mischaracterizes the price-squeeze concern, asserting that it would require increases in access charges and a "predatory strategy." Br. 88-89. Bell Atlantic is wrong on both counts. The opportunity for a price squeeze arises where an RBOC's access charges to IXCs exceed the RBOC's cost of providing access. That is already the case today for Bell Atlantic (see Gropper Aff. ¶ 68) -- without any increase in Bell Atlantic's access charges. Moreover, the price squeeze does not require Bell Atlantic to engage in predatory pricing, i.e., pricing long-distance below Bell Atlantic's own actual costs. It simply requires Bell Atlantic to offer long distance service at prices IXCs cannot match because their costs are inflated by Bell Atlantic's excessive access charges. Relief under section 271 thus will not be in the public interest until access charges are reduced to cost.

Bell Atlantic could also impair competition by means of cross-subsidies from its local exchange business to its long distance business (see Hubbard/Lehr Aff. ¶ 100;

[51] See Hubbard/Lehr Aff. ¶¶ 95-97. Bernheim/Ordover/Willig Aff.¶ 62; Gropper Aff. ¶¶ 67-69. Indeed, it is precisely this risk that recently caused one judge to comment that "[w]ithout access reform, it would be unreasonable to allow BA-PA into the interLATA toll market, or to declare the intraLATA market competitive as requested by BA-PA." Pennsylvania ALJ Access Reform Decision at 74.

Bernheim/Ordover/Willig Aff. ¶¶ 76-80; Gropper Aff. ¶¶ 77-80); as well as by discrimination in the pricing, development, provisioning, and maintenance of monopoly exchange access services to its "captive" long distance competitors, so as to raise their costs and degrade the quality of their service. Hubbard/Lehr Aff. ¶¶ 65-80; 94-109. Bernheim/Ordover/Willig Aff. ¶¶ 41-75; Gropper Aff. ¶¶ 17-76. Although Bell Atlantic dismisses these risks as "chimerical" (Br. at 90), it was precisely these sorts of discriminatory acts that caused the Bell companies' bottleneck local service to be separated from long distance service in the first instance,[52] and prompted Congress to preserve that separation under section 271.

3. Neither Regulation Nor Bell Atlantic's Proposed Enforcement Mechanisms Are Sufficient To Protect Competition .

a. Regulation Has Not Been Sufficient to Protect Competition.

Bell Atlantic's principal response to the risk that it will engage in anticompetitive conduct if permitted in the long distance market is to trumpet the efficacy of regulation. If regulation alone were sufficient to deter anticompetitive conduct, however, Congress need not have included a public interest test in the Act at all, but could have merely conditioned BOC in-region, interLATA entry upon the adoption of appropriate regulations. See Ameritech Michigan Order ¶ 388 ("Section 271 . . . embodies a congressional determination that . . . local telecommunications markets must first be open to competition so that a BOC cannot use its control over bottleneck local exchange facilities to undermine competition in the long distance market.")

Furthermore, Bell Atlantic fails to acknowledge that its anticompetitive conduct would remain exceptionally "difficult to police, particularly in situations where the level of the BOC's

[52] See United States v. American Tel. and Tel Co., 552 F. Supp. 131, 160-65 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

'cooperation' with unaffiliated . . . carriers is difficult to quantify." Non-Accounting Safeguards NPRM ¶ 139; Hubbard/Lehr Aff. ¶¶ 73-80, 103-09; Bernheim/Ordover/Willig Aff. ¶¶ 59, 81-98. Bell Atlantic contends that discrimination is impossible because "it is simply implausible that Bell Atlantic could impair quality sufficiently to benefit its own long distance operations, but not enough to enable the incumbents to detect wrongdoing." Br. 87. But discrimination need not be blatant or massive in order to raise a rival's costs and degrade its quality enough to tilt the playing field in favor of Bell Atlantic's affiliate. Moreover, Bell Atlantic's rhetoric entirely misses the central point about the limitations of regulation and competitor vigilance: Even where the discrimination is not difficult to observe, it will remain costly, time-consuming, and in some cases extremely difficult to prove that cross-subsidies, cost shifting, or service degradation is the product of anticompetitive discrimination rather than justifiable business practice. Hubbard/Lehr Aff. ¶¶ 73-80; Bernheim/Ordover/Willig Aff. ¶¶ 59, 81-98; Schwartz Supp. Aff. ¶ 38.

Again, Bell Atlantic's own conduct best illustrates the extreme costs of relying exclusively on regulation to control the anticompetitive behavior of a monopolist. Despite the New York PSC's efforts, for over 17 years, to open local markets to competition, CLECs have only made minimal inroads into Bell Atlantic's local monopoly. Bell Atlantic's years of foot-dragging in opening up its local markets is powerful evidence that it would be contrary to the public interest to admit Bell Atlantic into the long distance market until residential and business customers throughout New York have access to the services of facilities-based competitors.

b. Bell Atlantic's Proposed Enforcement Mechanisms Are Inadequate

As the Commission has made clear in two prior decisions, a BOC requesting authority to provide in-region, interLATA services under Section 271 is expected to demonstrate that it is subject to "appropriate self-executing enforcement mechanisms that are sufficient to ensure compliance with the established performance standards."[53] In an effort to meet this obligation, Bell Atlantic relies primarily on two proposed plans -- the Performance Assurance Plan ("PAP") and the Change Control Assurance Plan ("CCAP") -- which are presently under consideration by the PSC.[54] In addition, Bell Atlantic states that it is subject to self-executing remedies under "more than a dozen" interconnection agreements with CLECs.[55] In fact, however, it is clear that neither Bell Atlantic's proposed plans nor its interconnection agreements provide meaningful protection for CLECs against backsliding by Bell Atlantic after it is authorized to provide long distance services.

In the first place, Bell Atlantic's reliance on the PAP and CCAP to support its Application is premature. As Bell Atlantic concedes, the PAP and CCAP have only been "proposed" by Bell Atlantic. Application, p. 10. They have not been approved by the PSC, and they are not presently in place in New York. See Pfau/Kalb Aff., ¶ 181.[56] Bell Atlantic's application is therefore incomplete with respect to an element that is crucial to an assessment of the public interest, and for that reason alone can be denied.

Even if those plans were presently in place, however, they contain a number of fundamental structural flaws which would preclude them from providing effective protection for competition. These flaws include: (1) the insufficiency of the monetary consequences to Bell Atlantic under the proposed maximum annual cap on penalties; (2) the dividing and subdividing of the overall cap into a myriad of much smaller sub-caps; (3) the exclusion of critical metrics;

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[53] Ameritech Michigan Order ¶ 394; Second BellSouth Louisiana Order ¶ 364.

[54] See Br. 10, 84-87; Dowell/Canny Dec., ¶¶ 118-157.

[55] See Br. 87; Dowell/Canny Dec., ¶¶ 8, 125.

[56] Reliance on the PAP is also premature because it is based on performance measurements that have not been either fully developed or validated for accuracy. See Pfau/Kalb Aff. ¶¶ 182-86.

(4) the weighting and aggregating of performance metrics resulting in the masking of discriminatory performance; (5) excusing poor performance and delaying remedies; and (6) lowering the performance standards established by the PSC.

1. In order to be effective, an anti-backsliding plan must have sufficient monetary consequences to dissuade the BOC from exercising its natural incentives to use its monopoly power in the local market to exclude competition in both the local and long distance markets. As the Common Carrier Bureau recently told SBC:

> "The Bureau believes that the potential liability under such a plan must be high enough that an incumbent could not rationally conclude that making payments under an enforcement plan is an acceptable price to pay for hindering or blocking competition."[57]

In the case of New York, the potential benefits that Bell Atlantic could derive from discrimination in its provision of services and facilities to CLECs run into the billions of dollars. See Hubbard/Lehr Aff., Att. 3. By preventing the emergence of competition in its local markets, Bell Atlantic not only protects its enormous monopoly profits in the initial year, it protects its monopoly profits in succeeding years as well. And by retaining its monopoly position in the local market, Bell Atlantic will be able to leverage its local monopoly to reap additional gains in other related markets, including long distance services, high-speed data services, and other emerging electronic commerce markets.

Regardless of whether the amount at risk for Bell Atlantic under the PAP is "no more than $184 million annually" as the PAP itself states, or $269 million as Bell Atlantic asserts in its

[57] Letter from L. Strickling, Chief, FCC Common Carrier Bureau, to P. Hill-Ardoin, SBC, dated September 28, 1999, p. 2 ("Strickling Letter to SBC").

Application,[58] the monetary consequences of discriminatory performance by Bell Atlantic are plainly dwarfed by the benefits that Bell Atlantic can enjoy by excluding competitors and retaining its monopoly position as a provider of local telecommunications services in New York. Indeed, the maximum annual cap in the PAP was developed by Bell Atlantic wholly without reference to the size of the financial benefits that Bell Atlantic could expect to gain by engaging in discrimination. As a result, the maximum annual cap is both arbitrary and far too small to provide an effective deterrent to discriminatory behavior by Bell Atlantic. Pfau/Kalb Aff. ¶¶ 189-90.

This conclusion is confirmed by the Common Carrier Bureau's recent letter to SBC stating the Bureau's concern that a $120 million annual cap on Southwestern Bell's potential payments under an anti-backsliding plan was "too low to foster parity performance in a market the size of Texas."[59] When the larger New York market is compared to the Texas market on the basis of the BOC's gross revenues in the state, the corresponding cap for New York would be $189 million -- virtually the same as the maximum annual cap under the PAP. Pfau/Kalb Aff.

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[58] *Compare* PAP, p. 1 *with* Br. 10, 19, 85. The CCAP adds an additional $10 million in potential consequences. The $75 million difference between the two PAP figures arises from Bell Atlantic's claim that a provision in the PAP that would double the amount paid by Bell Atlantic in monthly bill credits if Bell Atlantic provides discriminatory performance for CLECs for three consecutive months in a particular Mode of Entry ("MOE") category would also have the effect of increasing the maximum annual cap by that amount. See Dowell/Canny Dec. ¶ 123. Nowhere in the PAP itself, however, is there any indication that the possible doubling of monthly MOE bill credits would have any effect on the maximum annual cap. Quite the contrary, the PAP specifically states that the maximum amount payable under the PAP "will total no more than $184 million annually," and that the doubling provision of the PAP will only affect bill credits "for the applicable MOE category" (PAP, pp. 1, 8) -- credits that would still be limited by the overall MOE sub-cap and monthly sub-caps as well as the annual cap. In any event, even under Bell Atlantic's dubious reading, such double bill credits are highly unlikely because the doubling provision only comes into play where Bell Atlantic's performance for CLECs is, on average, highly discriminatory across all of the metrics for an entire mode of entry for three consecutive months. See PAP, p. 8.

¶¶ 191-92. The Bureau's conclusion that Southwestern Bell's proposed $120 million maximum annual cap for Texas was "too low" thus also demonstrates that the $184 million annual cap proposed in the amended PAP for New York is also insufficient.

2. Just as important, however, the maximum annual cap established by Bell Atlantic in the PAP has no real significance for Bell Atlantic because of the manner in which that cap is divided and subdivided into ever smaller sub-caps, each of which provides a further, separate limit on Bell Atlantic's potential liability. As a result of this fundamental structural flaw of the PAP, the amount claimed by Bell Atlantic to be "at risk" under the PAP is nothing more than an illusion because the structure of the PAP renders extremely remote any likelihood that amounts even approaching the annual cap might ever actually be paid by Bell Atlantic, even if it were to engage in blatant discrimination that excludes CLECs from the market. Pfau/Kalb Aff. ¶¶ 193-94, 199-203.

The PAP is almost a completely top-down plan that fixes an upper limit and then divides that overall cap into a series of much smaller sub-caps. Having determined an annual "maximum amount at risk," Bell Atlantic proceeds to slice and dice that amount into so many smaller discrete sub-caps that the likely actual monthly payment or credit obligations become completely trivial in light of the size of the New York markets that are at stake. For example, the $150 million maximum annual cap on bill credits under the Mode of Entry ("MOE") and Critical Measures provisions of the PAP is divided into twelve separate maximum monthly caps of $12.5 million each (one twelfth of the total). Each of these monthly caps is then divided into two separate category caps of $6.25 million each, one for the MOE portion of the plan and one for the Critical Measures portion. The MOE cap is in turn divided into four separate caps for the

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[59] Strickling Letter to SBC, p. 2.

four separate modes of entry under the MOE portion of the plan, and the monthly cap for the Critical Measures portion of the plan is further divided up into separate caps for each of the eleven critical measures. These "caps within caps" serve no purpose whatsoever other than to reduce Bell Atlantic's exposure as one goes down through the many successive layers of the plan.[60] Pfau/Kalb Aff. ¶¶ 200-03.

The relatively small monetary penalties that Bell Atlantic proposes, and the complicated system of caps it proposes to shield itself from paying them, are thus insufficient to deter Bell Atlantic from backsliding. In redressing the inadequacy of these monetary penalties, the Commission should insist not only on higher penalties without caps, but also on the inclusion of appropriate non-monetary consequences to ensure compliance. Neither this Commission nor the CLECs have had experience with a BOC that is authorized to offer long distance service. If even sizeable monetary penalties prove inadequate to deter such a BOC from discriminating against its local and long distance competitors, the consequences for competition would be devastating. An appropriate backsliding plan therefore ought to include, for example, suspension of the BOC's authority to add new long distance customers in the event that its performance reaches a predetermined threshold of discrimination on certain key performance measurements. Such a remedy is fully consistent with the enforcement power that Congress expressly granted this

[60] For example, the New York PSC staff recently found that totally inadequate provisioning of UNE services by Bell Atlantic in August 1999 would have required Bell Atlantic to pay only $2.96 million as compensation, or $35.52 million if that level of performance continued for the entire year, even though such performance could entirely block development of the UNE mode of entry that is essential to the creation of residential competition in New York. See Pfau/Kalb Aff. ¶ 194. Further, the many sub-caps render it virtually impossible for Bell Atlantic to reach the overall annual cap unless *all* of the twelve monthly caps are met, which in turn requires that *each* of the dozens of individual sub-caps for *all* MOE categories and *all* Critical Measures must also be met each month, *plus* every one of the many Special Provisions sub-caps must be met.

Commission, see 47 U.S.C. 271(d)(6), and should be considered an essential part of a minimally adequate enforcement plan.

3. Bell Atlantic's potential exposure under the plans is further limited by the selection of only a few of the metrics developed in New York to assess consequences for discrimination by Bell Atlantic. The many metrics that are not included in the PAP will have no consequences at all and thus will not serve either to deter discriminatory performance by Bell Atlantic in those areas or to compensate CLECs. This exclusion violates the basic requirement that an anti-backsliding plan must be "sufficient to ensure compliance with the established performance standards."[61] Furthermore, the metrics excluded from the PAP include performance measurements that have repeatedly been found by this Commission to be "critical" and "fundamental" to any showing of nondiscriminatory performance for CLECs, including average installation intervals[62] and firm order confirmation ("FOC") timeliness.[63] As a result of these

[61] Ameritech Michigan Order ¶ 394; Second BellSouth Louisiana Order ¶ 364.

[62] See Second BellSouth Louisiana Order, ¶ 125; First BellSouth Louisiana Order ¶ 41; BellSouth South Carolina Order, ¶¶ 132, 134; Ameritech Michigan Order ¶¶ 166-168, 171. Average completion interval is also a required performance measurement under the Federal Performance Parity Plan established as a condition under the Commission's recent order approving SBC's acquisition of Ameritech. See Applications of Ameritech Corp. and SBC Communications, Inc. for Consent to Transfer Control, CC Docket No. 98-141, Memorandum Opinion and Order, App. C, Attachment Aa (released October 8, 1999) ("SBC-Ameritech Merger Order").

The Commission has also repeatedly rejected Bell Atlantic's claim that completion intervals for CLECs cannot be compared to the intervals that Bell Atlantic provides in its own retail operations. See Ameritech Michigan Order ¶¶ 169-170; BellSouth South Carolina Order ¶ 138; First BellSouth Louisiana Order ¶ 45. And in all events, even if the CLECs' service mixes or requested intervals are different, as Bell Atlantic has contended, Bell Atlantic cannot be permitted simply to exclude these critical measurements entirely from the PAP. Rather, it must provide desegregated data that demonstrate that the differences reported do not reflect actual differences in performance.

[63] See Second BellSouth Louisiana Order ¶ 120; First BellSouth Louisiana Order ¶ 35; BellSouth South Carolina Order ¶ 122. FOC timeliness is also a required performance

exclusions, even grossly discriminatory performance by Bell Atlantic in these critical areas will have no consequences at all under the PAP. Pfau/Kalb Aff. ¶¶ 205-06.

4. Moreover, after having selected the particular measurements that will be used in each segment of the plan and converting the Z scores for those metrics to performance scores, the PAP assigns weights to each metric and "aggregates" or averages all of the weighted performance scores for each category to derive a single overall score for that MOE category. It is only these weighted aggregate scores for the MOE categories that are used to determine whether any bill credits will be given. See Pfau/Kalb Aff. ¶¶ 208-09. The result of this arbitrary weighting and averaging process is that even egregiously bad performance on one or several key measures -- conduct that severely impedes competitors -- can be offset by merely adequate performance on other metrics and buried in the averaging process, so that there may be no monetary consequences at all for Bell Atlantic. Id. at ¶ 209. Similarly, the aggregation process permits Bell Atlantic to engage in targeted discrimination against individual CLECs without consequences, particularly small carriers whose numbers can easily be lost in the aggregating process. Id.

5. Another feature of the PAP that contributes substantially to both uncertainty and delay is that poor performance in one period can be canceled out by adequate performance in subsequent periods. Thus, the PAP provides that a performance score of –1 for any measure under either the MOE or the Critical Measures portions of the plan can be retroactively reduced to 0 if Bell Atlantic obtains a performance score of 0 for that measure over the next two months. PAP, pp. 6, 9. Such retroactive changes in performance scores destroy the

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measurement under the Federal Performance Parity Plan established as a condition under the Commission's order approving SBC's acquisition of Ameritech. See SBC-Ameritech Merger Order, App. C, Attachment Aa.

link between poor performance by Bell Atlantic and the monetary consequences for Bell Atlantic that is essential to deter poor performance and protect competitors from discriminatory behavior. Moreover, even if no retroactive score changes are made, this provision for potential retroactive revision of Bell Atlantic's performance scores always substantially delays any bill credits by Bell Atlantic for a period of at least four months, thereby further diluting the protection that the PAP offers to CLECs and consumers. Pfau/Kalb Aff. ¶¶ 214-15.[64]

6. Finally, the PAP is defective because it masks poor performance by setting performance standards for Bell Atlantic that are substantially less demanding than the performance requirements established by the PSC. Pfau/Kalb Aff. ¶¶ 219-22. These reductions of the required performance levels further insulate Bell Atlantic against meaningful consequences for bad performance, and effectively release Bell Atlantic from having to comply with the performance measures set by the New York PSC.

7. Bell Atlantic's alternative reliance on its interconnection agreements with CLECs to satisfy its obligation to have self-executing enforcement mechanisms in place that are sufficient to ensure compliance with established performance standards (Br. 87; Dowell/Canny Dec. ¶¶ 8, 125) is even more obviously groundless. In the first place, Bell Atlantic only claims that "more than a dozen" of its interconnection agreements have any such enforcement mechanisms. Br. 87. Most of Bell Atlantic 's interconnection agreements -- including its

[64] The complexity of the PAP also obscures a host of additional provisions which strongly bias the PAP in favor of Bell Atlantic and render it even more unlikely that Bell Atlantic will have to pay significant monetary consequences for discriminatory performance. For example, the PAP makes no distinction between a situation where there is a high likelihood that Bell Atlantic's conduct is discriminatory (i.e., a Z score of –1.645, reflecting a confidence level of 95.0% that discrimination has in fact occurred) and a situation where Bell Atlantic's performance for CLECs is so much worse that it is virtually certain that discrimination has occurred (*e.g.*, a Z score of less than –3.000, representing a confidence level of more than 99.9% that discrimination has occurred). Pfau/Kalb Aff. ¶ 217.

agreement with AT&T -- have no self-executing enforcement mechanism based on performance standards at all. Thus, of the 85 interconnection agreements listed in Appendix F of the Application, Bell Atlantic only claims that 32 have such an enforcement mechanism.[65] Moreover, many of the agreements that do contain liquidated damages provisions expressly state that those provisions will terminate as soon as the PSC completes its work on a performance quality plan. Pfau/Kalb Aff. ¶ 179. Further, even the liquidated damages provisions that do exist generally apply only to a handful of "specific activities," which cover only a small fraction of the performance measurements established in the PSC's carrier-to-carrier plan. Id. ¶ 180. Bell Atlantic's interconnection agreements, therefore, clearly do not provide an appropriate self-executing enforcement mechanism sufficient to ensure compliance with the necessary performance measurements.

B. Because The Interexchange Market Is Already Vigorously Competitive, Bell Atlantic's Claims Of Likely Consumer Benefits From Its Entry Are Baseless.

In arguing that its entry into the interexchange market would be in the public interest, Bell Atlantic predicts that its entry would produce tremendous benefits by making that market more competitive. In particular, it cites the estimate of Professor Paul MacAvoy, who contends that Bell Atlantic's in-region, interLATA entry will drive down long distance prices and stimulate the economy. But the logic of Professor MacAvoy is both incomplete and untenable: he anticipates enormous benefits from the entry of one firm into a market that already has hundreds of firms openly fighting for customers, but fails even to address the benefits flowing

[65] See Dowell/Canny Declaration, pp. 3-4 & Attachment A.

from the removal of entry barriers in a local market that has long been dominated by a single monopolist.[66]

Bell Atlantic's extravagant claims of public benefit depend on mischaracterizations of both the local exchange and interexchange markets. As discussed above, permitting Bell Atlantic to enter the interexchange market while it retains monopoly control of the local exchange market will harm competition in both the local and long distance markets. Moreover, the long distance market already displays the hallmarks of a vigorously competitive market: hundreds of new entrants; declining market share of the formerly dominant carrier; excess capacity; a high rate of customer churn; and declining prices. See Hubbard/Lehr Aff. ¶¶ 28-52; Bernheim /Ordover/Willig Aff. ¶¶ 99-156. As a result, Bell Atlantic's premature entry into that market will not bring the consumer benefits Bell Atlantic promises; rather, it will directly harm consumers.

Thus, after an objective examination of the relevant determinants of market power, there can be no tenable claim that the long distance market is non-competitive. In contending otherwise, Bell Atlantic and its experts rely principally on assertions that AT&T's rates have risen notwithstanding significant reductions in access charges. Br. 80; Taylor Dec. ¶¶ 10-18; MacAvoy Dec. ¶¶ 88-89. Those claims are false. They directly conflict with the Commission's findings, and they ignore data that conclusively show that rates paid by consumers have declined more than access charge reductions precisely because of the intense competition in that market.

[66] See Schwartz Supp. Aff. ¶ 18 ("[T]here is much more room to improve economic performance in the local market than in the interLATA market by fostering additional competition. . . .[E]ven a modest dose of increased competition in the local market can be expected to generate major benefits -- in the form of reduced costs, improved quality, increased variety of offerings, rationalization of the price structure in local markets, as well as spillover benefits in adjacent markets for interexchange and integrated services").

Hubbard/Lehr. Aff. ¶¶ 37-39; 117-22; Bernheim/Ordover/Willig Aff. ¶¶ 109-10, 135-40.[67] Indeed, the testimony of Bell Atlantic's economists that IXCs enjoy enormous profit margins,[68] is not only belied by the marketplace, but by the public comments of Bell Atlantic, whose President and Chief Operating Officer recently commented that long distance service "is not a business that's going to be profitable for us on day one or, for that matter, on day 700."[69]

In the face of an intensive IXC rate-cutting war,[70] Bell Atlantic argues that low-volume "customers commonly do not sign up for discount plans, which are unrewarding at low volumes, and are hit hardest by the incumbents' minimum-usage requirements and other fixed fees" and touts RBOC entry "as a possible solution to the plight of low-volume consumers. Br. 80-81 Bell Atlantic's contentions are erroneous. First, Bell Atlantic's contention that many consumers cannot benefit from the plethora of currently-available competitive options is false. AT&T today offers a rate of just 5 cents per minute at all times, subject to a monthly payment of $9.95. AT&T also offers a 7 cents per minute rate at all times for a monthly fee of $5.95. MCI/Worldcom offers a rate of 5 cents per minute 7:00 PM to 7:00 AM weekdays and all days Saturdays and Sunday, for a $1.95 monthly fee. Sprint offers a rate of 5 cents per minute 7:00 PM to midnight every day and 10 cents per minute at all other times for a $5.95 monthly fee.

[67] For example, AT&T's Average Revenue Per Minute (ARPM) for switched interstate toll fell over 69% in real terms since divestiture -- and, net of access, prices declined by 46%. Hubbard/Lehr Aff. ¶ 37. Between 1990 and 1998, real prices for consumer dial direct, business outbound and business inbound toll services declined between 24% and 58%, reflecting benefits to all types of customers. Id. All classes of residential customers, both high and low usage, benefited from these price declines. Id.

[68] For example, Professor MacAvoy estimates profit margins of up to 70%. MacAvoy Dec. ¶¶ 89-91.

[69] P. Goodman, *Long Distance Market Calls to Bell Atlantic*, Washington Post, Sept. 27, 1999 at A1, A10.

Excel Communications has just introduced a rate of 3 cents per minute from 7:00 PM to 7:00 AM and 10 cents per minute from 7:00 AM to 7:00 PM for a $5.95 monthly fee. Hubbard/Lehr Aff. ¶ 41. As Chairman Kennard aptly put it, the rate reductions reflected in these plans are an example of "competition at its best."[71]

Nonetheless, customers that want to avoid minimum usage fees or monthly charges[72] can presubscribe to any of the numerous carriers that offer calling plans that do not have minimum usage requirements or monthly fees.[73] Such customers may also choose not to presubscribe to any IXC and instead to use the services of the myriad "dial-around," prepaid card, or calling card providers.

Moreover, the notion that the RBOCs are the only answer for low-volume customers should also be rejected. The fact that the RBOCs today are the only entities that would be capable of providing a bundled "one-stop" offering of local and long distance service to residential customers on a widespread basis is precisely why the RBOCs must not -- and may not lawfully -- be granted section 271 authority until local markets are fully and irreversibly open to competition. AT&T does not dispute that the offering of bundled services can often yield efficiencies, and that a provider of a bundle of local exchange and long distance service

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70 See, e.g., R. Blumenstein, *Phone War Prompts a Record Number of Calls,* Wall Street Journal, Sept. 7, 1999, at B6.

71 "Kennard Sees Long Distance market as 'Competition At Its Best,'" Communications Daily's Washington Telecom Newswire (August 31, 1999).

72 Although AT&T is not required to do so, AT&T waives the monthly minimum usage requirement, the USF charge and PICC pass-through charge for consumers who inform AT&T that they qualify for participation in the Lifeline program in their state. See AT&T Tariff F.C.C. No. 27, §§ 3.5.12; 4.1.1.M.3, 4.1.1.N.3. AT&T sent low-volume customers several notices of the waiver, which can be requested simply by calling AT&T's toll-free customer service number.

could avoid the need to impose additional charges to the flat fees it collects from its local exchange customers in order to recover many of the billing and account-related costs of providing interexchange service. Indeed, that is why AT&T itself waives its minimum usage requirement entirely for customers that receive their local service from AT&T. AT&T Tariff F.C.C. No. 27, § 4.1.1.M.3.b. Today, however, AT&T and the other IXCs cannot provide residential customers with a widespread bundled offering of local and long distance service for one reason: because the RBOCs, including Bell Atlantic, continue to maintain a monopoly stranglehold over their local exchanges, and have consistently failed to satisfy the 1996 Act's market opening requirements.

Bell Atlantic offers no plausible reason why it would choose to target the least profitable section of the long distance market.[74] In the absence of such evidence, there is no reason to believe that Bell Atlantic's entry will bring any special benefits to low-volume long distance customers. See Ameritech Michigan Order ¶ 16.

Moreover, the measure of competition is not at the low end of the market, where regulation artificially depressed prices, but at the middle and high-volume end, where rates can reflect costs and carriers compete aggressively on price and quality to win customers. Bell Atlantic never even attempts to explain why, if it is correct that long distance carriers can successfully collude, those carriers have offered discounts to high volume customers who provide the most revenue -- or why, if these carriers can collude on price, they do not collude on

[73] For example, Sprint offers customers a Standard Weekend Plan with a weekend rate of 10 cents a minute and no fee or minimum usage.

[74] It is far more likely that Bell Atlantic will follow its merger partner, GTE, in pursuing a "targeted approach of wooing high volume customers." Communications Daily, 12/3/96, at 1.

non-price matters and instead choose to "waste" enormous sums on advertising and other marketing expenditures.

Also unfounded is Bell Atlantic's argument that SNET's entry into the long distance market illustrates the positive competitive impact of RBOC entry into interchange markets. To the contrary, SNET's long distance prices are no lower than prices offered by other IXCs in Connecticut and nationwide. Selwyn Aff., Att. 2. Indeed, the argument of Dr. Taylor to the contrary is founded on data that fail to reflect SNET rate increases and AT&T rate decreases. Id. ¶¶ 25-26. Moreover, consumers in Connecticut pay more for total telecommunications than consumers in many other states, including states where the BOC has been excluded from the interLATA market. Id., Att. 2. Without the pro-competitive incentives created by Section 271, SNET has persistently resisted state regulatory efforts to open up Connecticut local markets. Id. ¶¶ 7-14. Nor is the fact that SNET has captured significant market share attributable to SNET's greater efficiency. SNET's success is due in large part to its bundling of long distance offerings with its monopoly provision of local services and its aggressive promotion of PIC freezes for its own long distance customers. Id., App. 2.

Thus, far from proving the benefits of permitting a monopoly ILEC into an in-region, interLATA market, SNET's behavior in Connecticut illustrates what an ILEC unconstrained by the section 271 incentive will do to avoid opening its local market to competition.[75]

The article goes on to quote GTE's "President - long distance services" Rob McCoy as explaining, "We're not going after the mass market. That would be inefficient." Id.

[75] Bell Atlantic's reliance on the Bell Atlantic Eastern corridor interLATA rates is also misplaced. Although a customer can now presubscribe to Bell Atlantic for Eastern corridor calls, the customer must then dial a 10-XXX carrier access code for all interLATA calls that are not Eastern corridor. As a result, very few customers have presubscribed to Bell Atlantic in the corridor, and almost all Eastern corridor BOC calls require a carrier access code. It is these

Bell Atlantic's claim that it will spur competition by underpricing long-distance carriers is thus implausible in the extreme, for prices are already at competitive levels, and Bell Atlantic can achieve no cost advantages except through discrimination, cross-subsidies, and price squeezes. For this reason, Bell Atlantic's reliance upon Professor MacAvoy's estimate of the impact of Bell Atlantic's in-region interLATA entry on the New York economy is wholly specious. MacAvoy's conclusions are based on assumptions -- such as that Bell Atlantic's entry will reduce long distance service prices by as much as 50%[76] -- that are empirically unjustified and patently unreasonable. Hubbard/Lehr Aff. ¶¶ 121-22; Bernheim/Ordover/Willig Aff. ¶¶ 160-70. Moreover, MacAvoy's analysis is also rendered meaningless by its failure even to address the harm to local and long distance consumers -- over $1.3 billion per year[77] -- that would be caused by permitting Bell Atlantic to enter the in-region interLATA market before entry barriers to the local market are removed.

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obvious competitive handicaps, and not greater efficiencies, that forced Bell Atlantic to offer lower prices. Hubbard/Lehr Aff. ¶ 128 n.84.

[76] See, e.g., MacAvoy Dec. ¶ 49.

[77] Hubbard/Lehr Aff. ¶ 59 & Atts. 15A-15B.

CONCLUSION

For all of the above reasons, Bell Atlantic's New York application should be denied.

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October 19, 1999

Certificate of Service

I, Cassandra M. de Souza, do hereby certify that I caused one copy of the foregoing Comments of AT&T Corp. in Opposition to Bell Atlantic's 271 Application for New York to be served by First Class mail on all parties on the attached service list, this 19th day of October, 1999.

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Attachment A

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One eight-volume appendix